Trujillo v. Apple Computer, Inc. et al Doc. 89

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSE TRUJILLO, an individual, on behalf of himself and all others similarly situated, Plaintiff, v. APPLE COMPUTER, INC., a California Corporation, and AT&T MOBILITY LLC, a Georgia Corporation, Defendants.	Civil Case No. 1:07-cv-04946 Hon. Matthew F. Kennelly

SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF DEFENDANT AT&T MOBILITY LLC'S MOTION TO COMPEL ARBITRATION AND DISMISS ACTION

Dated: April 11, 2008

Victoria Collado
Sarah E. Reynolds
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
Tel: (312) 782-0600
Fax: (312) 701-7711

Evan M. Tager (*pro hac vice*)
Archis A. Parasharami (*pro hac vice*)
Kevin Ranlett (*pro hac vice*)
MAYER BROWN LLP
1909 K Street, N.W.
Washington, D.C. 20006-1101
Telephone: (202) 263-3000

Dockets.Justia.com

In his supplemental brief, plaintiff Jose Trujillo contends that his arbitration agreement with defendant AT&T Mobility LLC ("ATTM") is procedurally unconscionable because Apple Computer assesses a 10 percent restocking fee for certain open-box iPhone returns. Although Trujillo bears the burden of proving unconscionability (*see Zobrist v. Verizon Wireless*, 822 N.E.2d 531, 541 (Ill. App. Ct. 2004)), he has failed to carry that burden. Indeed, the record flatly contradicts his allegations in several respects. First, Trujillo asserts that because iPhone purchasers may first learn of the ATTM arbitration provision after opening the box containing the iPhone, Apple's restocking fee "forces" consumers to agree to arbitration. Pl. Supp. Resp. (Docket No. 86) 1–2. But as the record reveals, Trujillo could have reviewed ATTM's Terms of Service (including its arbitration provision) before he opened the box for his iPhone. He never contradicts our showing that the Terms of Service were available to him before he opened the iPhone box. Moreover, his argument is entirely hypothetical: Trujillo does not claim that, were it not for the restocking fee, he would have rejected ATTM's Terms of Service (including the arbitration provision) and given up on owning an iPhone. As the evidence shows, had Trujillo sought to return his iPhone to the Apple store because he disagreed with any of the ATTM Terms of Service, it is Apple's policy ***not*** to charge a restocking fee. Finally, even if Trujillo would have been subject to such a fee, nothing in Illinois law allows a customer to avoid his or her obligations under a contract merely because the vendor has imposed a modest restocking fee. To the contrary, courts enforce arbitration provisions even when the costs associated with rejecting them were far greater than the $50 fee that Trujillo claims Apple would have charged him.

Even if Trujillo could succeed in proving that some degree of procedural unconscionability exists—and he cannot—ATTM's arbitration provision must be enforced: For reasons we have explained (*see* Arb. Mem. (Docket No. 37) 8–10; Reply (Docket No. 77) 6–13), ATTM's arbitration provision is not substantively unconscionable at all, much less extremely so, and accordingly Trujillo's arbitration agreement is not unenforceable under Illinois's sliding-scale approach to unconscionability.

A. Trujillo has not contradicted our showing that ATTM's arbitration provision was available to him before he opened his iPhone's box.

Trujillo's new theory of procedural unconscionability fails at the outset because he has adduced no evidence to refute our showing that he could have reviewed ATTM's arbitration provision ***before*** he opened the box containing his iPhone. Although Trujillo asserts that a consumer "has no knowledge of [ATTM]'s *Terms of Service* or its arbitration clause" until opening the box and activating the iPhone (Supp. Resp. 2 (emphasis in original)), he ignores our showing that copies of ATTM's terms of service were available on ATTM's web site and at the store where Trujillo bought his iPhone. *See* Berinhout Dec. (Docket No. 40) ¶ 9. Had he wished, Trujillo could have reviewed ATTM's arbitration provision before opening his iPhone's box and facing any possibility of having to pay Apple's restocking fee. Under such circumstances, the Seventh Circuit has not hesitated to enforce arbitration provisions. *See James v. McDonald's Corp.*, 417 F.3d 672, 678 (7th Cir. 2005) (Illinois law) (arbitration provision in rules of promotional game was enforceable because the restaurant had posted the rules near the food counter); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) (Illinois and South Dakota law) ("shoppers can consult public sources," including "the Web sites of vendors," "that may contain * * * information" about the terms of service enclosed with products).

B. Trujillo has not met his burden of proving that he would have been subject to or was affected by Apple's restocking fee.

Even assuming that Trujillo could not have learned of ATTM's arbitration provision until he activated his iPhone, he cannot show that Apple would have required him to pay a restocking fee had he wished to reject the provision (or any other contractual term). To the contrary, the

Apple interrogatory response that Trujillo submits with his supplemental brief confirms that he would not have been charged a fee. According to Apple, "[a] customer may return an iPhone within thirty (30) days without being charged a restocking fee if the customer indicates that he or she does not agree with [ATTM]'s terms and conditions of service * * *." Supp. Resp., Ex. A at 2. Trujillo questions whether such a policy really exists (*see* Supp. Resp. 3), but in fact Apple's official retail store policy, which has been in effect since Apple began selling iPhones in June 2007, confirms that "[c]ustomers that have purchased an iPhone can return the iPhone within thirty (30) calendar days of the date of purchase ***without any restocking fee*** if they indicate that * * * [t]hey do not agree to the terms of the AT&T service contract * * *." Declaration of David Williams (attached) ¶¶ 3, 6 & Ex. 1.

Trujillo argues (Supp. Resp. 3) that Apple's policy is not adequately disclosed. But Trujillo never claims that ***he*** would have rejected ATTM's arbitration provision (or any other contractual term) and given up on having an iPhone if not for the prospect of having to pay a restocking fee. Instead, Trujillo's complaint is based on a hypothetical circumstance in which an iPhone purchaser might grudgingly accept the Terms of Service rather than paying the fee. *Id.* But even if the existence of a restocking fee imposed some degree of procedural unconscionability—as we explain below, it does not—the possibility that a contract might be "unconscionable" in some other "hypothetical" situation is no reason to refuse to enforce it when that situation is "irrelevant." *West v. Henderson*, 278 Cal. Rptr. 570, 576 (Ct. App. 1991). That is the case here: Trujillo never claims that Apple's restocking fee actually influenced his decisionmaking.

C. Any imposition of Apple's restocking fee would not render ATTM's arbitration provision procedurally unconscionable under Illinois law.

Finally, even if Apple's restocking fee would have applied to Trujillo and even if Trujillo had introduced evidence that the fee prevented ***him*** from returning his iPhone and thereby avoiding becoming subject to the arbitration provision, that fee would not make the arbitration agreement procedurally unconscionable under Illinois law. Modest restocking fees like Apple's 10% fee are commonplace. Major retailers including Amazon.com, Best Buy, Circuit City, and Target charge 15% restocking fees for certain electronic equipment.[1] Almost assuredly, those retailers delay disclosure of the full terms and conditions of sale—including limitations of liability and warranty disclaimers—until the customer opens the box. As the Seventh Circuit has explained, "[p]ayment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors" because "[p]ractical considerations support allowing vendors to enclose the full legal terms with their products." *Hill*, 105 F.3d at 1149. Unless the existence of restocking fees constitutes a generally applicable ground under Illinois contract law for refusing to enforce ***any*** term of such a contract, Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, requires that arbitration provisions in these contracts be enforced. *See, e.g.*, *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004) (FAA requires states to enforce arbitration provisions in non-negotiable form contracts "unless states would refuse to enforce all off-the-shelf package deals") (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–88 (1996)).

That Illinois law requires enforcement of arbitration provisions in contracts with restocking fees follows from *Hill*. There, the Seventh Circuit enforced Gateway's arbitration provision even though the plaintiffs, who had purchased a desktop computer by phone, may have "wanted to return the computer" after opening the box and discovering the arbitration provision, "but were dissuaded by the expense of shipping." *Hill*, 105 F.3d at 1150. As the court explained, the plaintiffs "knew before they ordered the computer that the carton would include *some* important terms, and they did not seek to discover these in advance." *Id.* (emphasis in original). Similarly, Trujillo was on notice that ***some*** terms would govern his ATTM wireless service; his choice to await full discernment of those terms likewise does not permit him to avoid his contractual obligations.

---

[1] *See* http://www.amazon.com/gp/help/customer/display.html?nodeId=15015711; http://www.bestbuy.com/site//olspage.jsp?type=page&contentId=1117177044087&id=cat12098; http://www.circuitcity.com/rpsm/cat/-13414/edOid/105452/rpem/ccd/lookLearn.do; http://www.target.com/b/602-2734622-7205415?ie=UTF8&node=10665391.

The Illinois Appellate Court has recently confirmed that Illinois law does not mandate that consumers who wish to cancel a subscription service because its terms require arbitration must receive complete refunds for any equipment they have purchased. *Bess v. DirecTV, Inc.*, __ N.E.2d __, 2008 WL 740344 (Ill. App. Ct. Mar. 18, 2008) ("*Bess II*"). While Trujillo contends that "the majority took great care to point out that Bess would not incur any penalty for return of her satellite television equipment" (Supp. Resp. 5), in fact the majority agreed that, as "the dissent points out," DirecTV had "***provide[d] no assurance*** that [a] customer" who wished to reject DirecTV's arbitration provision could "return the equipment" required to receive DirecTV's programming "and receive a full refund." *Bess II*, 2008 WL 740344, at *7 (emphasis added).

Finally, although Trujillo complains that Apple's restocking fee is a "stiff" 10 percent, which "can be as high as $50.00" (Supp. Resp. 2, 3), Illinois law requires enforcement of arbitration agreements even when the hardships involved with rejecting arbitration are far greater. For example, the Seventh Circuit has held that it was not procedurally unconscionable for an employer to require an employee of nine years' standing to agree to arbitration or be fired from his job. *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 363, 366–67 (7th Cir. 1999) (applying Illinois law).

CONCLUSION

The Court should grant ATTM's motion to compel arbitration, and dismiss all claims in this action against ATTM.

Dated: April 11, 2008

Respectfully submitted,

/s Sarah E. Reynolds_______

Victoria Collado
Sarah E. Reynolds
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
Tel: (312) 782-0600
Fax: (312) 701-7711

Evan M. Tager (*pro hac vice*)
Archis A. Parasharami (*pro hac vice*)
Kevin Ranlett (*pro hac vice*)
MAYER BROWN LLP
1909 K Street, N.W.
Washington, D.C. 20006-1101
Tel: (202) 263-3000

Counsel for Defendant AT&T Mobility LLC

CERTIFICATE OF SERVICE

I certify that on April 11, 2008, I caused the foregoing Supplemental Reply Brief In Support Of Defendant AT&T Mobility LLC's Motion To Compel Arbitration And Dismiss Action to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF.

/s Sarah E. Reynolds__________________

Sarah E. Reynolds
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
Tel: (312) 782-0600
Fax: (312) 701-7711